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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1982

MCCLATCHY NEWSPAPERS, d/b/a
THE SACRAMENTO BEE,
*Petitioner,*

VS.

CENTRAL VALLEY TYPOGRAPHICAL UNION No. 46,
INTERNATIONAL TYPOGRAPHICAL UNION,
*Respondent.*

**On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## Reply To Respondent's Opposition To Petition For Writ Of Certiorari

ALLEN W. TEAGLE
COUNSEL OF RECORD
DAVID S. DURHAM
LITTLER, MENDELSON, FASTIFF & TICHY
A PROFESSIONAL CORPORATION
650 California Street,
20th Floor
San Francisco, CA 94108
Telephone (415) 433-1940
*Attorneys for Petitioner McClatchy Newspapers, d/b/a The Sacramento Bee*

DOWNE OF SAN FRANCISCO, INC. • 150 NINTH ST. • S.F., CA 94103 • (415) 864-2200

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## Reply To Respondent's Opposition To Petition For Writ Of Certiorari

In this reply Petitioner McClatchy Newspapers, d/b/a The Sacramento Bee ("Publisher" or "Petitioner") addresses the points raised in the opposition to petition ("Opp") filed by Respondent Central Valley Typographical Union No. 46, International Typographical Union ("Union" or "Respondent").

In its opposition, the Union does not dispute that the issue raised (i.e., the proper standard of review of labor arbitration awards), is important to this country's labor relations system, nor does it dispute that this is an area in which national uniformity is particularly necessary, requiring this Court's exercise of its supervisory authority

over the lower courts within the federal system. More significantly, the Union fails to address squarely the issue before this Court on Petition for Writ of Certiorari. That is, whether the "plausible interpretation" standard utilized by the Ninth Circuit Court of Appeals in reviewing labor arbitration awards is in conflict with this Court's decisions as well as decisions of the other courts of appeal.

It is not surprising that the Union did not directly address the propriety of the "plausible interpretation" standard, or the failure of this standard adequately to address the proper role of courts in reviewing labor arbitration awards. The Union's unexplained silence on these key issues speaks forcefully in favor of granting the Petition. Nowhere does the Union refute that this standard is improper and suffers from two major infirmities. It constitutes an improper injection of the courts into the merits of arbitration disputes, and at the same time results in a lack of meaningful review by courts of arbitration awards to determine whether the arbitrator remained faithful to his charge to interpret and apply the collective bargaining agreement, rather than to dispense his own brand of industrial justice.

Regarding the first infirmity of this "plausible interpretation" standard, the Union agrees that it is not the role of the courts to interpret and apply collective bargaining agreements or to inject themselves into the merits of the underlying disputes. Nonetheless, it is apparent, and the Union admits (Opp p. 4) that this is inherent in the "plausible interpretation" standard, and was precisely what occurred below. The courts below themselves interpreted the scanner agreement's terms and confirmed the award because the courts' interpretation concurred with the arbi-

trator's. This approach is simply wrong and contrary to the teachings of this Court, as it is not the role of courts to sit as second-level arbitrators reviewing the merits or the "plausibility" of the arbitrator's decision. *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 568 (1960).

Aside from improperly meshing the courts into the merits of disputes, the "plausible interpretation" standard understates the obligation of the courts to review the means used by the arbitrator to reach his results in order to determine whether or not the arbitrator remained faithful to his duty to interpret and apply the collective bargaining agreement, rather than dispense his own brand of industrial justice. The Union does not seriously address this infirmity. The Ninth Circuit's "plausible interpretation" or "bottom line" approach would leave the arbitrator free to ignore all of the evidence contained within the record, so long as the decision's "bottom line" represented a plausible interpretation. Under this standard, it would not be germane for a court to examine whether the arbitrator based his decision on improper and extraneous factors. Indeed, this "plausible interpretation" standard is so easy to meet that it gives arbitrators free rein to make decisions without regard to the record and without regard to the intent of the parties as expressed in the collective bargaining agreement.

In short, the problems inherent in the "plausible interpretation" standard, which the Union was unable to address, are fatal problems which place that standard at odds with this Court's teaching. Under that standard, so long as the contract language is in any way ambiguous, arbitrators would be free to dispense their own brand of

industrial justice, make awards based on passion, supposition, unsupported inference, and the arbitrator's personal notions of industrial justice. All such improper decisions would stand, since virtually any interpretation would be "plausible." Thus, it is apparent that notwithstanding any arguments put forth in the Union's Opposition, the "plausible interpretation" standard utilized by the Ninth Circuit stands contrary to applicable decisions of this Court.

Next, the Union attempts to downplay the existence of conflicting standards among the various courts of appeals asserting that this conflict does not exist (Opp p. 7). However, in order to make this argument, it was necessary for the Union to overlook cases cited in the Publisher's Petition, cases which clearly articulate a standard fundamentally different from that utilized by the Ninth Circuit. The Ninth Circuit's "plausible interpretation" or "bottom line" standard neither contemplates nor requires the court's examination of the record before the arbitrator, but merely concentrates on the plausibility of the actual interpretation made. This is directly contrary to the cases cited in the Petition which require recourse to the record so that the reviewing court is able to determine whether or not the arbitrator's decision constituted an interpretation and application of the collective bargaining agreement.

In contrast to the decisions of the First, Fourth, Sixth, Eighth and Tenth Circuit Courts of Appeals cited in the Petition, the standard utilized by the Ninth Circuit would give arbitrators unlimited authority and unbridled power without regard to the parties' intent as expressed in the collective bargaining agreement. Indeed, so long as contract language was in any way ambiguous, the Ninth Circuit's "plausible interpretation" standard would necessarily

result in confirmation, since virtually any interpretation of ambiguous contract language would be plausible.

It is not surprising that the Union did not mention, for instance, the decision of the Sixth Circuit in *Storer Broadcasting Co. v. American Federation of Television and Radio Artists*, 600 F.2d 45 (6th Cir. 1979), *cert. denied*, ..... U.S. ....., 70 L.Ed.2d 641 (1981). There, the Sixth Circuit vacated an arbitration award where the arbitrator based his decision on a factual finding that was supported by no evidence in the record. This standard conflicts with the Ninth Circuit's "plausible interpretation" standard as there is no room in the "plausible interpretation" standard for such an analysis. It simply does not permit any review of the record before the arbitrator. Application of the Ninth Circuit's "plausible interpretation" standard to the facts in *Storer Broadcasting* would have necessarily resulted in a totally different decision as the arbitrator's interpretation of the ambiguous contract language was certainly "plausible."

Also not dealt with in the Union's brief is *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 549 F.2d 575 (6th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979). There, the Sixth Circuit vacated an arbitrator's award due to the lack of any evidence in the record that the company and union intended that the contract language in question have the meaning ascribed to it by the arbitrator. This lack of factual support was fatal in the view of the Sixth Circuit, to the validity of that award. The Ninth Circuit's standard, which contemplates review of the arbitration decision's "bottom

line" in an evidentiary vacuum, would not have resulted in vacation of the arbitrator's award based upon the *Detroit Coil* facts.

The Union's failure to distinguish *Electronics Corporation of America v. IUE Local 272*, 492 F.2d 1255 (1st Cir. 1974), is not surprising either as this case too represents a clear break from the "plausible interpretation" standard enunciated by the Ninth Circuit. In *Electronics Corporation of America, supra*, the court carefully analyzed the record before the arbitrator and determined that the factual finding which constituted the basis for the arbitrator's decision was totally lacking in evidentiary support in the record. On the other hand, the minimal standard of review utilized by the Ninth Circuit would have necessarily resulted in a contrary decision, as the issue before the court was whether or not a termination was for just cause. Any result would have been "plausible," even a result that was based not upon the collective bargaining agreement but rather on the arbitrator's own notions of justice and fairness.

Notwithstanding the arguments put forth in the Union's Opposition, it is manifest there is a deep split in the circuits on the standard to be utilized by the courts in reviewing labor arbitration awards. This is a very important standard, critical to the nation's system of labor relations, and to this Court's policy favoring voluntary submission of labor disputes to arbitration. The Union's criticism of the rule of the other circuits, which requires review of the record, cannot detract from the irrefutable fact that a split among the circuits exists. It is respectfully submitted that this Court should exercise its supervisory authority to return national uniformity to this critical area of the law.

Finally, the Union argues even if a rift in the circuits exists, and even if the Ninth Circuit's standard is out of touch with the decisions of this Court, the instant case is not the appropriate vehicle to address these problems since this case allegedly involves an issue of contract interpretation in which the facts were "uncontested" (Opp p. 8). This argument is not persuasive. Indeed, it is surprising that the Union would make such an argument as this case presented hotly contested facts regarding critical issues of bargaining history which cast light upon the parties' intent as to the meaning of the Scanner Agreement's terms. As stated in the Petition (Pet. p. 11), in the instant case the arbitrator ignored his own factual findings that the parties were in complete agreement that the term "strike" in the Scanner Agreement included sympathy strikes. Notwithstanding this finding, the arbitrator interpreted the language otherwise, thus dispensing his own brand of industrial justice.

In short, the arguments presented in the Union's opposition should do nothing to sway this Court from the unmistakable conclusion that there exists a deep split among the circuits as to the appropriate level of review of labor arbitration awards. There is no doubt and it is not contested that this is an important matter, an area in which the courts of appeals need guidance from this Court. The "plausible interpretation" standard is at odds with the decisions of this Court in that it improperly injects courts into the merits of disputes, while at the same time provides no protection against arbitrators who ignore their charge.

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

DATED: December 2, 1982.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A PROFESSIONAL CORPORATION

By

ALLEN W. TEAGLE
Counsel of Record

By

DAVID S. DURHAM

*Attorneys for Petitioner McClatchy Newspapers, d/b/a The Sacramento Bee*